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IN THE

Supreme Court of the United States

October Term, 1962

No. 265

RONALD CARR,

Appellant,

—against—

THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT

STATEMENT AS TO JURISDICTION

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No.

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Appellant,

—against—

THE STATE OF NEW YORK

Appellee.

STATEMENT AS TO JURISDICTION

Opinions Below

The opinion of the Court of Claims of the State of New York is reported in 30 Misc. 2d 983, 221 N. Y. S. 2d 636. The opinion of the Appellate Division, Third Department is reported in 15 A. D. 2d 709, 223 N. Y. S. 2d 229. These opinions are annexed hereto in Appendix A, *infra*, pp. 18, 23.

Jurisdiction

1. This appeal is from a decision of the Appellate Division of the Supreme Court of the State of New York, Third

Department which affirmed the judgment of the Court of Claims of the State of New York entered on September 12, 1961, dismissing the claim of appellant in this action. The action was commenced by notice of claim (R 11)* under Article II of the New York Court of Claims Act.

2. The Appellate Division handed down its opinion on January 17, 1962 (R 60, Appendix A, *infra*, p. 23). The order of affirmance of the Appellate Division was entered on January 26, 1962 (R 47, Appendix A, *infra*, p. 25) and the judgment of affirmance was entered thereon in the Court of Claims on February 1, 1962 (R 49, Appendix A, *infra*, p. 27). Leave to appeal to the Court of Appeals of the State of New York from the judgment of affirmance of the Appellate Division was denied by the Court of Appeals on April 26, 1962 (11 N. Y. 2d 645; R 53, Appendix A, *infra*, p. 29). The appellant thus went as far as he could in the State Courts under the New York practice, and upon the denial by the Court of Appeals of leave to appeal, the decision of the Appellate Division, as of that date, was the decision of the highest court of the State (*Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 160, 98 L. ed. 583, 588, 74 S. Ct. 396; *Hammerstein* v. *Superior Court of California*, 341 U. S. 491, 95 L. ed. 1135, 71 S. Ct. 820; *Department of Banking of Nebraska* v. *Pink Corp.*, 317 U. S. 264, 87 L. ed. 254, 63 S. Ct. 233, reh. den. 318 U. S. 801, 87 L. ed. 1166, 63 S. Ct. 850; *Tucker* v. *Texas*, 326 U. S. 517, 90 L. ed. 274, 66 S. Ct. 274). Notice of appeal to this Court was filed by appellant with the Clerk of the Court of Claims of New York, the Court possessed of the record, on June 20, 1962.

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* Numbers preceded by letter R refer to pages of certified record filed on the docketing of this appeal.

3. The jurisdiction of this Court upon appeal is conferred by 28 U.S.C.A. Section 1257 (2). Appellant challenges the validity of the New York pari-mutuel revenue law, as construed by the Courts of New York State, on the ground that as applied to appellant on the admitted facts herein it is repugnant to the Constitution of the United States and the decision of the highest Court of that State is in favor of validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal include *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288, 66 L. ed. 239, 42 S. Ct. 106; *Covey* v. *Somers*, 351 U. S. 141, 142, 100 L. ed. 1021, 1024, 76 S. Ct. 724; *Metalka Indian Community* v. *Egan*, 369 U. S. 45, 7 L. ed. 562; *International Harvester Credit Corp.* v. *Goodrich*, 350 U. S. 537, 100 L. ed. 681, 76 S. Ct. 621; *Bode* v. *Barrett*, 344 U. S. 583, 97 L. ed. 567, 73 S. Ct. 468; *Detroit* v. *Murray Corp.*, 355 U. S. 489, 492, 2 L. ed. 2d 441, 445, 78 S. Ct. 458.

Constitutional and Statutory Provisions Involved

The federal constitutional provisions and state statutes involved are set forth in Appendix B, *infra*.

Question Presented

Is the application to the appellant, on the admitted facts herein, of the pari-mutuel revenue law of New York (Article I of Chaper 2 of Title 21, McKinney's Unconsolidated Laws of New York) as construed by the State Court, repugnant to the Due Process and Equal Protection Clauses of the

Fourteenth Amendment to the Federal Constitution and to the Impairment of the Obligation of Contract Clause of Article I, Section 10 of the Federal Constitution?

Statement

The facts herein are admitted under the notice to admit procedure of New York, (opinion of Court of Claims, Appendix A, *infra*, p. 19). Based on such admitted facts, appellant moved for judgment under New York procedure (R 13) upon which motion, judgment may be given for either party and upon which motion the allegations of the notice of claim (R 11) are likewise deemed admitted (*Cordes* v. *California Insurance Co.*, 6 A. D. 2d 985, 986). These admitted and undisputed facts (R 17-21) are as follows:

On April 18, 1959, at Jamaica Race Track, the appellant purchased two ten dollar win tickets, at Window 301, on a horse named Manassa Mauler in the seventh race (R 11, 17). Sometime in the minutes that intervened between this purchase and the running of the race, he inadvertently destroyed these tickets, mistaking them for losing tickets in the prior race (R 11, 17). The horse won the race at a payoff of $129.50 for a two dollar ticket, making the amount due appellant, from the pari-mutuel pool, $1,295 (R 17). The appellant thereupon discovered the inadvertent destruction of the tickets and forthwith notified the management of the track (R 17) and also a representative of the State Tax Commission who made an investigation of the facts (R 23). The clerk at window 301 recalled and admitted the purchase of the two tickets by the appellant (R 18). At the close of the racing day, it was ascertained that two ten

dollar win tickets on Manassa Mauler in the seventh race which had been sold at window 361 had not been presented for payment (R 18, 23). The appellant by correspondence with the racing association and the State Tax Commission further advised them of the facts (R 22, 25). The State, in reply, refused to pay stating that "in view of the information in your letter of April 29 the sum of $1,295.00 which represents the value of these two destroyed winning tickets will be part of the uncashed ticket money paid over to the State on April 10, 1960 by the New York Racing Association" (R 28).

The two tickets were not presented for payment by April 1, 1960 (R 18), the time limited by statute (Section 7, 9, Unconsolidated 7957, 7959, Appendix B, *infra*, p. 31), and pursuant to such statute, the amount of $1,295 represented thereby was turned over by the racing association to the State (R 18) which refused to pay the same to appellant on the ground that under the statute this money belonged to the State and that appellant could have no claim or right to it (R 19, 39).

On a motion for judgment under Section 476 of the Civil Practice Act of New York, affidavits in support of such motion are not permitted, since only a question of law is involved (R 16, 57). The only affidavits permitted are those for the purpose of establishing the admissions of the facts, and the moving affidavit here was confined solely to such purpose (*Lefler v. Clark*, 247 App. Div. 402, 404). Under New York practice, the record consists merely of the notice of motion, the admitted facts and the pleadings, in this case, the notice of claim, the allegations of which are deemed denied, since the State is not required to file an answer

(Rule 13, Court of Claims) and all contentions and questions raised by the parties are required to be set forth in the briefs submitted by them, as the moving and opposing affidavits state was done in this case (R 16, 42).

In his brief and on the oral argument in the Appellate Division, the appellant raised only two points, the point headings of which are as follows:

"First Point

"The application to the appellant of the pari-mutuel revenue law (Article I of Chapter 2 of Title 21, McKinney's Unconsolidated Laws of New York) as construed by the Court of Claims is repugnant to the Due Process Clause of Article I Section 6 of the Constitution of the State of New York and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution and of the Impairment of Contract Clause in Article I, Section 10 of the Federal Constitution.

Second Point

The statute as applied to appellant can be sustained as constitutional only if it be interpreted to include therein a remedy against the State for the recovery by a bettor, who has lost or unintentionally destroyed his ticket, of the share of the win pool belonging to him."

The same two points were raised by appellant in the Court of Claims in his brief on the motion for judgment made by appellant.

Under Section 25 of the Court of Claims Act of New York, an appeal is taken by filing a notice "• • • briefly stating the grounds of the appeal." By reason thereof, the

notice of appeal contained in the record clearly shows that the constitutional question presented herein was raised by appellant in all the State Courts. In such notice of appeal to the Appellate Division appellant specified: "that the Court of Claims, in its decision, erroneously overruled the claimant's contention that the application to the claimant of Article I of Chapter 2 of Title 21 of the Unconsolidated Laws of New York, as construed by said Court, was repugnant to the Federal and State Constitutions" (R 7).

The State Courts did not, in their opinions, refer to the constitutional question raised by appellant. They held that the statute barred recovery and dismissed appellant's claim. In so doing, they necessarily rejected appellant's contention, squarely presented to them, that such application of the statute to him, on the admitted facts herein, was repugnant to the Constitution. Otherwise, they could not have dismissed the claim and denied appellant any right to recover his conceded winnings. The sustaining of the statute in such manner necessarily rejected appellant's constitutional objection and the State Court's silence with respect thereto in its opinion cannot destroy appellant's right to appeal under 28 U.S.C.A. 1257(2) (Stern & Gressman, Supreme Court Practice, (2d Ed.) p. 57; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 281, 282, 76 L. ed. 1102, 1106, 52 S. Ct. 556).

The appellant as an aid to him in presenting this appeal applied to the Appellate Division for a certificate that it had necessarily passed on the constitutional question raised by appellant. The Court denied such application without opinion (R 54). Thus, the Appellate Division did not, in denying said application, state that it had not passed on the constitutional question, but, in denying such certificate,

chose to maintain its silence with respect thereto. The State Court could not very well state that it had not passed on the question since, as above stated, it is impossible to perceive how the Court could dismiss the appellant's claim and throw him out of court without rejecting the constitutional contentions raised by appellant, since the only points raised by appellant in the State Courts (p. 6, *supra*) were couched in constitutional terms objecting to the application of the statute to him as in violation of the Constitution. The State Court cannot by such perverse silence frustrate appellant's right to have the constitutional question squarely raised by him heard on appeal to this Court (*Chicago B. & Q.R. Co.* v. *Chicago*, 166 U. S. 226, 231-232, 41 L. ed. 979, 17 S. Ct. 581; *Schlemmer* v. *Buffalo & P. R. Co.*, 205 U. S. 1, 51 L. ed. 681, 27 S. Ct. 407; *Kaukana Water Power Co.* v. *Green Bay & M. Canal Co.*, 142 U. S. 254, 269, 35 L. ed. 1004, 12 S. Ct. 173; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 236, 33 L. ed. 892, 10 S. Ct. 533; *St. Louis Consolidated Coal Co.* v. *Illinois*, 185 U. S. 203, 206-207, 46 L. ed. 872, 22 S. Ct. 616; *Chapman* v. *Goodnow*, 123 U. S. 540, 31 L. ed. 235, 8 S. Ct. 211; *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 31 L. ed. 202, 8 S. Ct. 217; *Fox River Paper Co.* v. *R. R. Comm. of Wisconsin*, 274 U. S. 651, 653-654, 71 L. ed. 1279, 1282, 47 S. Ct. 669; *Murray* v. *Charleston*, 96 U. S. 432, 441-442, 24 L. ed. 760).

The Federal Question Is Substantial

The State of New York has enacted a statutory provision for pari-mutuel wagering at race tracks in which it has set forth regulations and conditions for the conduct thereof. To be valid, the regulations and conditions must be consistent with and afford due process of law and equal pro-

tection of the law to those participating under the statute and must not impair the obligation of the contracts made thereunder.

The condition that no payment shall be made out of the pari-mutuel pool without presentation of a ticket may be reasonable when applied during the statutory period when the tickets are valid. For, if the racing association paid out during that period without surrender of a ticket, the ticket might thereafter turn up for payment and the racing association would suffer a loss by such double payment, by being required to pay out more than was in the pool. In all such cases "the essence of the matter was protection against double liability" (*United States* v. *Bowery Savings Bank* (S.D.N.Y.), 185 F. Supp. 30, 32, affd. 297 F. 2d 380, 383).

After April 1st of the following year, the outstanding tickets are no longer valid and by holding up and then paying out an uncashed share of the pool to the admitted purchaser of a winning ticket who had inadvertently destroyed it, the racing association could suffer no risk of double liability. However, under the statute, the racing association may not retain such money but must under sanction of penalty and interest forthwith pay it over to the State (Sec. 12, Unconsolidated Sec. 7963, Appendix B, *infra*, p. 33). Accordingly, the New York Courts have held that the racing association would unfairly be subjected to possible double liability, to the State and the purchaser, if it was also required, after the statutory mandated payment to the State, to litigate with and be required to pay such claimants (*Aliano* v. *Westchester Racing Ass'n*, 265 App. Div. 225, 228-230). The State, however, upon receipt of the money at the termination of the limitation period is not sub-

ject to any double liability. However, the State Court in this case has held that under the statute, upon the State's receipt of the money it belongs to the State absolutely without any claim or right of the admitted purchaser of the inadvertently destroyed ticket attaching thereto.

Thus, in this case, the State admits that to its knowledge, acquired within minutes after the purchase, the appellant purchased the winning tickets and inadvertently destroyed them within minutes thereafter, and therefore the time limitation until April 1, 1960 to present them was of no benefit to him, since the presentation of the tickets then, on April 18, 1959, became impossible. Nevertheless, the statute is so applied to him that the appellant's share of the win pool, within minutes after the purchase, then and there became the property of the State, to be paid over to it on April 10, 1960, the holding of it by the racing association during the interval being a mere formality, since the tickets would concededly never be presented for payment. Thus the statute as applied to the appellant is a hollow, mocking gesture, and the State has provided him with no means whatever to collect the money admittedly his which the State, by its statute, has expropriated as its own.

While the statute barring recovery may be valid when applied to a purchaser who retains, and thus has a reasonable opportunity to present, the ticket during the limitation period and omits to present it, it is invalid when applied to the admitted facts herein. "A statute valid as to one set of facts may be invalid as to another" (*Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415, 79 L. ed. 949, 955, 55 S. Ct. 486; *Dahnke-Walker Co.* v. *Bondurant*, *supra*, 257 U. S. 282, 289, 66 L. ed. 239, 42 S. Ct. 106; *Covey* v. *Somers*, *supra*, 351 U. S. 141, 146, 100 L. ed. 1021, 1026).

There being no longer any possibility of double liability, it is wholly unreasonable to visit such a harsh and conclusive penalty upon the inadvertent destruction of a ticket by an admitted and undisputed purchaser who makes prompt notification thereof, and any statute which a State enacts for its own benefit by which if can expropriate such moneys and enforce such harsh and conclusive penalty of forfeiture by imposing what it admits under the facts is an impossible condition, is shocking to every sense of justice and fair play and is a deprivation of property without due process of law.

Although the purchase of the pari-mutuel tickets by the appellant is declared by the statute to be lawful (Sec. 2, Unconsolidated Sec. 7952; Appendix B, *infra*, p. 30) the State Courts in their opinions herein justify the confiscation by the State of appellant's share of the win pool on the ground that in this "gambling" transaction bettors can have no legal complaint against anything the State does thereunder because whatever is granted to them by the State in the statute is an indulgence and not a right (Appendix A, *infra*, pp. 21, 23). Thus, under such statute, the State could, for example, make it a condition that a winning bettor must present his ticket at the cashier's window within one minute or forfeit his winnings to the State, or that winnings would be paid only to those wearing blue neckties, and these conditions, though unreasonable and confiscatory, would nevertheless be binding on purchasers of tickets. This was pointed up on the argument of the appeal in the Appellate Division by the Attorney General who stated in his argument that this was so and that "if the statute had provided that winnings would be paid only to those wearing blue neckties that only wearers of blue neckties could collect."

All statutes enacted by a State are subject to the limitations thereon contained in the Federal Constitution, without exception in the Federal Constitution and no State can, as New York does here, claim immunity from the Due Process, Equal Protection or the Obligation of Contract Clauses of the Federal Constitution for any of its statutes (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 721-722, 6 L. ed. 2d 45, 50, 81 S. Ct. 856; *Cooper* v. *Aaron*, 358 U. S. 1, 16-17, 3 L. ed. 2d 5, 16, 78 S. Ct. 1401).

Since the State has enacted a statute providing for the conduct of pari-mutuel wagering, such statute, like all state statutes, must conform to Federal constitutional limitations on state legislation in every respect. The State cannot on the one hand, say to a party to the contract that this is a legal transaction, and thereby induce him to enter into it and then, on the other hand, deny him his rights thereunder by saying that he has no rights but merely such indulgence as the State grants him, because this is a "gambling contract." The provision by the State for the conduct of this legal transaction must be fair and reasonable. It cannot under the guise of regulation, arbitrarily make provisions for its own benefit which would effect the confiscation of moneys due the winners.

"Due process bars * * * enactments that shock the sense of fair play—which is the essence of due process—" (*Galvan* v. *Press*, 347 U. S. 522, 530, 98 L. ed. 911, 921, 74 S. Ct. 737). "The Due Process Clause empowers this Court to nullify any state law which 'shocks the conscience' offends 'a sense of justice' or 'runs counter to the decencies of civilized conduct' " (*Rochin* v. *California*, 342 U. S. 165, 175, 96 L. ed. 183, 192, 72 S. Ct. 205). "There has not been 'the protection of the individual against arbitrary action'

which Mr. Justice Cardozo characterized as the very essence of due process" (*Slochower* v. *Board of Education of New York*, 350 U. S. 551, 559, 100 L. ed. 692, 701, 76 S. Ct. 637). "To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of such right under any condition" (*Cummings* v. *Missouri*, 71 U. S. (4 Wall.) 277, 327). "The application of the statute must not be such as to make the remedy a shadow" (*Worthen* v. *Kavanagh*, 295 U. S. 56, 62, 79 L. ed. 1298, 55 S. Ct. 555). "Process which is a mere gesture is not due process" (*Mullane* v. *Central Hanover Bank*, 339 U. S. 306, 314, 315, 94 L. ed. 865, 70 S. Ct. 652; *Covey* v. *Somers*, *supra*, 351 U. S. 141, 146).

The application of the statute to the appellant is, likewise, a denial of the equal protection of the law in discriminating against this particular bettor who though admittedly the person entitled to the money, cannot collect it along with other winning bettors. The Equal Protection Clause "prohibits prejudicial disparities before the law" and "a system which may be constitutionally unobjectionable if applied to all may be brought within the prohibition if some have more favorable treatment" (*Fay* v. *New York*, 332 U. S. 261, 285, 91 L. ed. 2043, 67 S. Ct. 1613; *Yick* v. *Hopkins*, 118 U. S. 356, 373, 374, 30 L. ed. 220, 6 S. Ct. 1064).

The pari-mutuel system of betting constitutes a contract between the bettors contributing to the pool (*Wise* v. *Delaware Racing Ass'n.*, 28 D. Ch. 532, 45 A. 2d 547, 165 A.L.R. 830). "The racing association is the administrative agent for the collection and distribution of the pool" (*Aliano* v. *Westchester Racing Association*, 265 App. Div. 225, 228). When the appellant purchased the tickets he became a party

to the contract. Their "loss or unintended destruction • • • in no way affects the validity or sufficiency of the transaction of which it is evidence" (54 C.J.S. Lost Instruments sec. 2, p. 802). "The condition that the certificate be surrendered at the time of payment is no more than the law would require without a provision to that effect. This condition is qualified, however, by an implied exception in the case of loss or destruction" (*Zander v. New York Security & Trust Co.*, 178 N. Y. 208, 212). "Despite the fact that a note, bond or mortgage is lost or destroyed the means of recovery is never withheld by the imposition of some condition which the creditor finds it impossible to fulfill" (*Myers v. Albany Savings Bank*, 270 App. Div. 466, 470 affd. 296 N. Y. 562, rearg. den. 296 N. Y. 636). Thus, loss or unintended destruction of the contract or evidence thereof does not impair the obligation of the contract or the right to recover upon proof of such loss or destruction.

By imposing an impossible condition which destroys the contract and denies the right of appellant to recover the money due him under the contract into which he had entered, upon proof of such inadvertent destruction, the statute impairs the obligation of the contract in violation of the Constitution.

The Court of Claims in its opinion sanctions the confiscation of appellant's winnings because the statute was enacted for the purpose of raising revenue for the State (Appendix A, *infra*, p. 21).

Section 9 of the Pari-Mutuel Revenue law (Unconsolidated Sec. 7959, Appendix B, *infra*, p. 31) provides that out of the pool, the racing association shall deduct eleven per cent as the state tax and shall retain four per cent for its

own use and purposes and shall distribute the balance among the holders of winning tickets. Thus, as the tax, the State had already received its full eleven per cent of the pool when the amount of $1,295 was set aside as appellant's share of the pool. Thus, to permit the State to expropriate and seize this entire additional sum of $1,295 as a tax would amount "to spoliation under the guise of exerting the power of taxing" (*Dane* v. *Jackson*, 256 U. S. 589, 599, 65 L. ed. 1107, 41 S. Ct. 566), and "is simple confiscation and a denial of due process of law" (*Miller Bros. Co.* v. *Maryland*, 347 U. S. 340, 342, 98 L. ed. 744, 747, 74 S. Ct. 535; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443, 444, 85 L. ed. 267, 61 S. Ct. 246; *Detroit* v. *Murray Corp.*, 355 U. S. 489, 492, 2 L. ed. 2d 441, 445, 78 S. Ct. 458; *Society for Savings* v. *Bowers*, 349 U. S. 143, 151, 99 L. ed. 950, 959, 75 S. Ct. 607; *Morton Salt Co.* v. *City of South Hutchinson* (CA 10), 159 F. 2d 897, 901; *Security Nat. Bank* v. *Young* (CA 8), 55 F. 2d 616, 618).

Actually, Section 12 (Unconsolidated Sec. 7963, Appendix B, *infra*, p. 33) requiring the racing association to pay over uncashed winnings to the State, is a windfall statute by which the State is preferred to the racing association as the beneficiary thereof. Such windfall statutes, as in the case of abandoned property statutes, have been held to satisfy due process only because such statutes have substituted the State as the debtor (*Anderson Nat'l Bank* v. *Luckett*, 321 U. S. 233, 241, 242, 88 L. ed. 693, 64 S. Ct. 599; *Connecticut Mutual Life Ins. Co.* v. *Moore*, 333 U. S. 541, 92 L. ed. 863, 68 S. Ct. 682, reh. den. 334 U. S. 810).

The windfall must, however, be a true windfall of abandoned winnings not timely claimed. Where a winner as

here, makes claim to his winnings on the day of purchase of the ticket and continues to do so, there is no valid windfall.

Here, the State by such legislation could validly provide that the appellant's remedy on the admitted facts be not against the racing association, but, upon the State's acquisition of the money, a substituted one against the State. But it cannot, as it does here, arbitrarily deprive the appellant of his property without providing an appropriate remedy whereby appellant may have recourse to the courts to enforce his right to the money due on the tickets admittedly purchased by him (*Elton* v. *Tacoma*, 228 U. S. 148, 155, 57 L. ed. 773, 33 S. Ct. 428; *Crane* v. *Hahlo*, 258 U. S. 142, 147, 66 L. ed. 514, 42 S. Ct. 214; *Brinkerhoff & Farris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 678, 679, 74 L. ed. 1107, 1112, 1113, 50 S. Ct. 451; *Truax* v. *Corrigan*, 257 U. S. 312, 332, 334, 66 L. ed. 254, 263, 267, 42 S. Ct. 124; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332, 78 L. ed. 342, 347, 54 S. Ct. 140; *Western & Atlantic R. R.* v. *Henderson*, 279 U. S. 639, 642, 73 L. ed. 884, 888; 49 S. Ct. 445; *Bandini Petroleum Co.* v. *Superior Ct.*, 284 U. S. 8, 19, 76 L. ed. 136, 144, 52 S. Ct. 103; *Twining* v. *New Jersey*, 211 U. S. 78, 101, 53 L. ed. 97, 29 S. Ct. 14; 16A C.J.S. Constitutional Law Sec. 614, p. 768).

That the question, whether a State can under the guise of a revenue law enact a statute by which it confiscates monies due purchasers of tickets who have inadvertently destroyed them, is one of importance is evidenced by the fact that this is a frequent occurrence and therefore it may be said that the statute is designed as a means whereby the State can expropriate such moneys. In its letter to appellant's attorney refusing his demand for payment, the State

Tax Commission states: "We receive similar type letters monthly under various circumstances in which the person who originally purchased the winning tickets had lost or destroyed same" (R 39).

CONCLUSION

Appellant respectfully suggests that this appeal brings before this Court a federal question under the Constitution which is important both in term of legal principles and in the application of the pari-mutuel revenue laws enacted by a substantial number of the States of the United States and that sufficient has been stated herein to demonstrate that the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

IRWIN N. WILPON
Counsel for Appellant

July, 1962

APPENDIX A

Opinion of Court of Claims

RYAN, *P. J.*

Claimant has sued the State of New York, alleging that on April 18, 1959 he purchased two $10.00 "win" parimutuel tickets on the horse, Manassa Mauler, in the Wood Memorial (7th race) at the Jamaica Race Track, operated by the New York Raceway Association, Inc. The Mauler came in first, claimant reports, paying a mutuel of $129.50 and entitling the claimant on his investment to the sum of $1295.00. The pleading further alleges that through inadvertence the "win" tickets were destroyed, and although claimant demanded payment it was refused by the Association and the money was turned over to the treasury of the State of New York. After filing the claim, claimant's attorney served a Notice to Admit upon the Attorney General who made no response thereto. CPA §322. Claimant now moves for judgment pursuant to CPA §476 and CCA §9, subd. 9.

Included in claimant's Notice to Admit were many statements of the details of the transactions and correspondence between the claimant and Raceway Association and between claimant and the employees of the State of New York, which followed upon the incident of the race and the destruction of the tickets. Since none of these details has been denied they must be accepted as facts. Without reciting them, they disclose claimant's promptness in calling attention to his situation and generally establish his good faith in the matter. Important among them is the fact that

the mutuel clerk recalled the sale to the claimant and the further fact that the amount of the winning is in the hands of the State Tax Commission.

The Attorney General opposes the motion for judgment on the pleadings, first upon the theory that because Court of Claims Rule 13 does not require the State of New York to plead, no issue of fact is presented. And secondly, that CPA §322 does not apply to the Court of Claims. There are holdings to the contrary. Queensboro Farm Products, Inc. vs. State (1956), 6 Misc. 2d 445, 161 N. Y. S. 2d 989, affd. 5 App. Div. 2d 967, 171 N. Y. S. 2d 646, affd. 5 N. Y. 2d 977; Easley vs. State (1957), 10 Misc. 2d 370, 169 N. Y. S. 2d 354; Pearlman vs. State (1959), 18 Misc. 2d 494, 191 N. Y. S. 2d 422.

The Attorney General further contends that there are no admissions properly before the Court. He argues that the admissions recited by the claimant are merely implied; that thus they deprive the Court of Claims of determining liability against the State and he cites CCA §12, subd. 1. The point is not well taken. The cases cited by the Attorney General, viz., Langan vs. First Trust & Deposit Co. (1946), 270 App. Div. 700, 62 N. Y. S. 2d 440, affd. 296 N. Y. 1014; Belfer vs. Dictograph Products, Inc. (1949), 275 App. Div. 824, 89 N. Y. S. 2d 125, are inapplicable. See also New York Telephone Co. vs. Ladenheim (1958), 14 Misc. 2d 939, 181 N. Y. S. 2d 157.

Applications pursuant to CPA §476 and RCP 112 are ordinarily addressed to the discretion of the Court. Stevenson vs. News Syndicate Co. (1950), 302 N. Y. 81. But where the motion is treated solely as a challenge to the legal sufficiency of the complaint or of the defense, only questions

of law are involved; not considerations of discretion. Gracie Square Realty Corp. vs. Choice Realty Corp. (1953), 305 N. Y. 271 at page 277. Under RCP 112, if either party is entitled to judgment on the pleadings the Court may give judgment to the party entitled thereto, disregarding which party instituted the motion.

Accepting the factual situation established before us by the failure of the Attorney General to respond to the Notice to Admit, or to controvert the facts therein recited, we come to the question of law to be determined herein. That question is: Is the claimant entitled to recover from the State of New York the sum of $1295.00, which, had he not inadvertently destroyed it, he could have collected upon the winning ticket which he had purchased? We think not.

In Aliano vs. Westchester Racing Association (1942), 265 App. Div. 225, 38 N. Y. S. 2d 741, the Appellate Division, Second Department, over-ruled the previous decision of the Appellate Term expressed in Giordano vs. Metropolitan Jockey Club (1941), 176 Misc. 506, 29 N. Y. S. 2d 939. It therein held that a plaintiff, in a situation similar to that in which this claimant finds himself, could not recover the winnings allotted to the ticket which he had lost. Confronted with the cited authority claimant here argues that the New York Raceway Association, Inc. is only the administrative agent for the collection and distribution of the pool and must remit to the State Tax Commission the winnings allotted to tickets which are not presented for redemption. He asserts that the ticket is not the contract, or the source of the right to recover the winnings, but merely the evidence of such contract and of such right. In support of this argument he cites Des Arts vs. Leggett (1858), 16

N. Y. 582; Frank vs. Wessels (1876), 64 N. Y. 155 at page 158; Zander vs. New York Security Trust Co. (1904), 178 N. Y. 208 at page 212, and other long standing decisions. These cases deal with lost notes, destroyed insurance policies and similar commercial documents. Counsel argues that claimant's situation is analogous.

There can be no question that the ticket bearing the number of the winning horse in a pari-mutuel race is evidence of the right to collect the winnings which are held in trust. But gambling differs essentially from business transactions and ordinary remedies are not usually available for the enforcement of gambling debts. Where there is a statute applicable to a gambling contract, recovery is enforceable only in accordance with its provisions. Holberg vs. Westchester Racing Association (1945), 184 Misc. 581, 53 N. Y. S. 2d 490.

In his opinion in the case of Aliano vs. Westchester Racing Association, above cited, Judge Close remarked that betting on horse races was illegal until the enactment of the Pari-Mutuel Revenue Law and that such statute

> "• • • was not enacted for the purpose of legalizing betting at race tracks but of raising revenue for the State, • • •"

He further said:

> "Pari-Mutuel betting is lawful therefore only if the payment of the proceeds of the bet is in conformity with the statutory requirements respecting payment. There is implicit in all the provisions of the statute concerning payment to patrons the condition that tickets, which are essential to the pari-mutuel system, be presented."

Thus we see that placing a bet at a horse race and collecting the winnings thereon is legal only within the narrow confines of the pari-mutuel law. There is no statutory provision made for lost tickets. This is purposely so since the ticket is an essential part of the entire scheme. Failure to present it, for whatever reason, is a waiver of the right to recover the winnings. This claimant did not present his ticket because he inadvertently destroyed and discarded it. His predicament is unfortunate but the statute must be strictly followed.

We find jurisdiction to direct judgment on the pleadings. We find that claimant may not recover, as a matter of law, upon the undisputed facts. His claim must be dismissed.

Enter judgment accordingly.

Dated: August 8, 1961

BERNARD RYAN
Presiding Judge of the Court of Claims

Opinion of the Appellate Division

This is an appeal from a judgment in the Court of Claims which dismissed the claim as a matter of law.

The claimant went to the Jamaica Race Track on April 18, 1959 where during the course of the afternoon he purchased two Ten-Dollar win pari-mutuel tickets on a horse known as "Manassa Mauler". The horse won the race and as a result the two tickets were worth $1,295.00. The claimant by mistake destroyed the tickets but thereafter made claim for the proceeds and it was established, among other facts, that there remained unpaid the proceeds from two Ten-Dollar win tickets.

We find it unnecessary to determine the application of Section 322 of the Civil Practice Act (admission as to facts) but if for the purpose of this action we assume all the facts to be admitted, we find as a matter of law that the claimant is not entitled to recover against the State.

Section 7955 of the Unconsolidated Laws states in part "upon presentation of winning tickets"; Section 7956 states "winning patrons"; Section 7957 states "all winning pari-mutuel tickets must be presented for payment * * *"; Section 7959 states "holders of winning tickets therein, provided such tickets be presented for payment * * *"; Section 7963 is headed "Disposition of unpaid money due on account of pari-mutuel tickets not presented."

From the relevant language of the statutes quoted it is evident that it was the intent of the Legislature that any payment resulting from pari-mutuel betting was conditioned upon the presentation of a ticket.

Gambling in New York State is prohibited by the Constitution except for the amendment which permits pari-mutuel

betting and this law should be strictly enforced. There being no way of collecting winning proceeds without the presentation of the all important ticket, the claim must be dismissed.

Judgment of the Court of Claims unanimously affirmed, without costs.

Present: Bergan, *P.J.*, Coon, Gibson, Herlihy and Reynolds, J.J.

Order of Affirmance of Appellate Division

At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, at the City of Albany, New York, commencing on the 13th day of November, 1961.

Present:

HON. FRANCIS BERGAN,
Presiding Justice,
HON. WILLIAM H. COON,
HON. JAMES GIBSON,
HON. J. CLARENCE HERLIHY,
HON. WALTER B. REYNOLDS,
Associate Justices.

No. 3663

RONALD CARR,
Claimant-Appellant,

—against—

THE STATE OF NEW YORK,
Respondent.

The above named claimant in this action, having appealed to the Appellate Division of the Supreme Court, Third Department, from a judgment of the Court of Claims entered in the office of the Clerk thereof on the 12th day of September, 1961, and the said appeal having been argued by

Irwin N. Wilpon, Esq. for the appellant and by Hon. Louis J. Lefkowitz, Attorney General of the State of New York, by Donald A. MacHarg, Assistant Attorney General, of counsel, for the respondent, and the Court after due deliberation having handed down its decision on the 17th day of January, 1962, unanimously affirming such judgment, it is hereby

ORDERED, that the judgment so appealed from be and the same hereby is affirmed, without costs of this appeal to either party.

JOHN J O'BRIEN
Clerk

A True Copy
Entered: January 26, 1962

JOHN J. O'BRIEN
Clerk

Judgment Entered on Order of Affirmance of Appellate Division

STATE OF NEW YORK
COURT OF CLAIMS

Claim No. 37786

RONALD CARR,

Claimant-Appellant,

—against—

THE STATE OF NEW YORK,

Respondent.

The above named claimant-appellant having appealed to the Appellate Division of the Supreme Court, Third Judicial Department, from a judgment of the Court of Claims entered in the Clerk's Office thereof on the 12th day of September, 1961, dismissing the claim as a matter of law (Ryan, P. J.); and the said appeal having been argued at a term of the Appellate Division of the Supreme Court, Third Judicial Department, commencing at Albany, New York, on the 13th day of November, 1961, by Irwin N. Wilpon, Esq., for the claimant-appellant and by Hon. Louis J. Lefkowitz, Attorney General of the State of New York, by Donald A. MacHarg, Assistant Attorney General, of counsel, for the defendant-respondent, and after due deliberation the said Appellate Division of the Supreme Court, Third Judicial Department having handed down its deci-

sion on the 17th day of January, 1962, affirming, without costs of the appeal to either party, the judgment so appealed from; all concurring, Bergan, P. J., Coon, Gibson, Herlihy and Reynolds, J. J., being present; and an order having been entered in the Clerk's Office of the Appellate Division of the Supreme Court, Third Judicial Department, on the 26th day of January, 1962, in accordance with the said decision;

And the original record on appeal together with a certified copy of the order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office thereof on the 26th day of January, 1962, having been filed in the Clerk's Office of the Court of Claims on the 30th day of January, 1962, it is

ORDERED AND ADJUDGED that the judgment of the Court of Claims entered in the Clerk's Office thereof on the 12th day of September, 1961, dismissing as a matter of law the claim of the above named claimant against the State of New York, Claim No. 37786, be and the same hereby is affirmed without costs of the appeal to either party.

Dated: Albany, New York
February 1, 1962

JOHN J. CLARK
Clerk of the Court of Claims

Order Denying Motion for Leave to Appeal

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-sixth day of April, A. D. 1962.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

---

3 Mo. No. 320

RONALD CARR,

Appellant,

vs.

THE STATE OF NEW YORK,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A COPY

GEARON KIMBALL
Deputy Clerk

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment XIV

• • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10

No State shall • • • pass any • • • Law impairing the Obligation of Contracts • • •.

Pari-Mutuel Revenue Law of New York (Title 21, Chapter 2, Article I, McKinney's Unconsolidated Laws of New York)

Section 2, Unconsolidated Section 7952. Pari-mutuel betting on horse races legalized

In the exercise of the authority vested in it by section nine of article one of the state constitution, as amended by vote of the people at the general election in November, nineteen hundred thirty-nine, the legislature hereby prescribes that pari-mutuel betting on horse races shall be lawful in this state if conducted in the manner and subject to the conditions and supervision provided by this act, notwithstanding the provisions of any other law, general, special or local, prohibiting or restricting lotteries, pool selling or

bookmaking, or any other kind of gambling; it being the purpose of this act to derive from such betting as herein authorized a reasonable revenue for the support of government and to promote agriculture generally and the improvement of breeding of horses particularly in the state. Such pari-mutuel betting shall only be conducted within the grounds or enclosure of a race track on races at such track and on such dates when racing at such track shall have been authorized pursuant to this act. L. 1940, c. 254, sec. 2, eff. March 31, 1940.

Section 7, Unconsolidated Section 7957. Rules for the conduct of pari-mutuel betting

1. The state racing commission shall make rules regulating the conduct of pari-mutuel betting, as authorized pursuant to this act.

2. The rules shall provide that all winning pari-mutuel tickets must be presented for payment before April first of the year following the year of their purchase and failure to present any such ticket within the prescribed period of time shall constitute a waiver of the right to participate in the award or dividend.

* * * * *

Section 9, Unconsolidated Section 7959. Disposition of pari-mutuel pools; percentage payable to state as a tax; authority of counties or certain cities to impose a tax

1. Every corporation or association authorized under this act to conduct pari-mutuel betting at a race meeting on races run thereat, except as provided in section nine-a of this act with respect to non-profit racing associations, shall

distribute all sums deposited in any pari-mutuel pool to the holders of winning tickets therein, provided such tickets be presented for payment before April first of the year following the year of their purchase, less the following percentages of the total deposits, plus the breaks: * * * for the year nineteen hundred fifty-six, and each year thereafter, fifteen per centum. The breaks are hereby defined as the odd cents over any multiple of five, calculated on the basis of one dollar, otherwise payable to a patron. Of the amount so retained there shall be paid by such corporation or association to the state tax commission as a reasonable tax by the state for the privilege of conducting pari-mutuel betting on the races run at the race meeting held by such corporation or association, which tax is hereby levied: (a) in the first zone, the following percentages of the total pool, plus sixty per centum of the breaks; * * * for the year nineteen hundred fifty-six and each year thereafter, eleven per centum and (b) in the second zone, the following percentages of the total pool, plus fifty per centum of the breaks; * * * for the year nineteen hundred fifty-six and each year thereafter, ten per centum. The balance of the retained percentage of such pool and of the breaks shall be held by such corporation or association for its own use and purposes. * * *

Appendix B—Constitutional and Statutory Provisions Involved

Section 12, Unconsolidated Section 7963. Disposition of unpaid money due on account of pari-mutuel tickets not presented.

The sum held by any corporation or association authorized to conduct pari-mutuel betting for payment of outstanding winning pari-mutuel tickets and for refunding the price of pari-mutuel tickets shall be retained by such corporation or association for such purposes until April first of the succeeding year. Within ten days thereafter, the balance of such sum remaining unclaimed and any other unclaimed amount received in the course of conducting pari-mutuel betting shall be paid to the state tax commission. A penalty of five per centum and interest at the rate of one per centum per month from the due date to the date of payment of the unclaimed balance shall be payable in case such balance is not paid when due. Such amounts, interest and penalties when collected shall be paid by the state tax commission into the general fund of the state treasury. L. 1940, c. 254, sec. 12; amended L. 1944, c. 669, sec. 3; L. 1945, c. 124, sec. 3; L. 1946, c. 287, sec. 1; L. 1957, c. 447, sec. 3, eff. April 12, 1957.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 265

RONALD CARR,

Appellant,

—against—

THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS

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IN THE

Supreme Court of the United States

October Term, 1962

No. 265

ROYALD CARR,

Appellant,

—against—

THE STATE OF NEW YORK,

Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS

The opinions below, facts as to jurisdiction, statutes involved, question presented and the statement of the case are set forth in the jurisdictional statement filed by appellant.

(1)

If the application of the statute to the appellant was invalid, as repugnant to the federal constitution, the State was unjustly enriched by the payment to it of the monies due appellant and upon its refusal of appellant's demand therefor, was liable to appellant in an action for money had and received.

As stated in *MacMurray v. City of Long Beach*, 292 N. Y. 286, 291:

> "Finding in the complaint allegations which, if proved, would establish that the defendant has re-

> ceived from the plaintiff a sum of money which it could not in good conscience retain and that the defendant has refused to pay over the same after demand therefor, a cause of action for money had and received is stated."

The notice of claim is, under the New York Court of Claims Act (Sec. 11, Court Rule 9), required to briefly state the underlying facts (*Harvey Chalmers & Son Inc.* v. *State of New York*, 271 App. Div. 699, 701, 68 N. Y. S. 2d 827, 830 affd. 297 N. Y. 690). The notice of claim in this case thus briefly makes such claim for money had and received. The basis of the claim is the unjust enrichment. The legal points establishing unjust enrichment are not required to be alleged in the notice of claim, but are presented to the Court upon the adjudication of the claim.

Upon a motion for judgment on admissions, as is stated in the jurisdictional statement (pp. 5-6), affidavits are not permitted and the legal contentions are required to be set forth in the briefs of the parties. In the jurisdictional statement, appellant states (p. 6) that the same two there quoted points raised in the Appellate Division were raised by appellant in his brief in the Court of Claims, which, was of course, served on counsel for the appellee. Undoubtedly, in preparing this motion to dismiss, counsel for appellee checked appellant's brief in the Court of Claims and found that the following points were raised in said brief:

Point I

If the State's construction of the statute be accepted, the statute is unconstitutional, since it deprives the claimant of his property without due process of law and impairs the obligation of contract in contravention of the fourteenth amendment and Article I, Section 10 of the Federal Constitution and Article 1, Section 6 of the State Constitution.

Point II

The statute can be sustained as constitutional only if it be interpreted to include therein a remedy against the State for the recovery by a bettor, who has lost or unintentionally destroyed his ticket, of the share of the win pool belonging to him.

In appellant's brief in the Appellate Division (p. 6), the very first sentence of argument under the "First Point" quoted at page 6 of the jurisdictional statement states: "Although the opinion of the Court of Claims does not mention it, this point was raised below." Neither in its brief nor in oral argument in the Appellate Division, did appellee contend that this statement in appellant's brief was incorrect.

Despite his evident knowledge of the points raised by appellant in the Court of Claims, counsel for appellee at page 3 of his brief on this motion, purports to profess ignorance thereof and creates the inference that no claim under the federal constitution was made in that court. Counsel then makes what is nothing less than a deliberate misstatement (Brief, p. 3) that "constitutional rights were belatedly asserted in appellant's brief in the Appellate Division."

Further spinning his web of deceit, counsel for appellee

the Court of Appeals on constitutional grounds and thereby is committed to the non-existence of a constitutional question.

In his affidavit in support of appellant's motion in the Court of Appeals for leave to appeal, a copy of which was, of course, served upon and is in the possession of counsel for the appellee, appellant's counsel stated at pages 6-7 thereof:

> "In the Court of Claims and in the Appellate Division, the claimant contended, that the application to the claimant of the statute as construed by the State was repugnant to the Federal and State Constitutions and that the statute could be sustained as constitutional only if it be construed to afford claimant a remedy against the State to recover the moneys admittedly his share of the pari-mutuel pool.
>
> The Court of Claims and the Appellate Division did not in their opinions discuss the constitutional question raised by appellant, but confined their opinions to holding that the statute bars the claimant from recovering said moneys from the State (135-141; pp. 28-29, 39-40 annexed hereto). However, the Courts below necessarily overruled claimant's contentions that the statute as applied to him was unconstitutional, in order to hold that the statute was a bar to recovery by claimant. The opinion of the Court of Claims is reported in 30 Misc. 2d 983. The opinion of the Appellate Division is reported in 15 A. D. 2d 709.
>
> The question of the construction of the statute so as to afford claimant a remedy was urged by the claimant as an alternative by which the Court could avoid holding, as contended by claimant, that the statute as applied to him by the State was repugnant to the Federal and State Constitutio . Because such alternative point was raised below, there is a ques-

tion whether an appeal lies nevertheless as of right on such constitutional question (*Valz* v. *Sheepshead Bay Bungalow Corp.*, 249 N. Y. 122, 132, cert. den. 278 U. S. 647; *Matter of Kohnberg*, 5 N. Y. 2d 859) or whether such alternative question as to construction precludes an appeal as of right (*Matter of Cortes*, 5 N. Y. 2d 917; *Matter of Rueff*, 273 N. Y. 530; *Peo. ex rel. Ryan* v. *Lynch*, 262 N. Y. 1, 4; *Matter of Chirello*, 283 N. Y. 417, 420; *Powers* v. *Porcelain Insulation Corp.*, 285 N. Y. 54, 56-57; *Matter of Wallace*, 6 N. Y. 2d 843; *Pomeranz* v. *City of New York*, 3 N. Y. 2d 885; *Yaras* v. *City of Albany*, 305 N. Y. 580). Because of such uncertainty on his part, claimant has deemed it expedient to move for permission to appeal.

A brief covering the questions of law raised in the Courts below is annexed hereto."

In his brief in the Court of Appeals in support of said motion the appellant raised the following points on which he sought review:

FIRST POINT

The application to the appellant of the pari-mutuel revenue law, as construed by the courts below, is repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution and of Article 1, Sections 6 and 11 of the State Constitution and of the Impairment of the Obligation of Contract Clause in Article I, Section 10 of the Federal Constitution.

SECOND POINT

The statute as applied to appellant can be sustained as constitutional only if it be interpreted to include therein a remedy against the State for the recovery by a bettor, who has lost or unintentionally destroyed his ticket, of the share of the win pool belonging to him.

The appellee, in his brief in the Court of Appeals in opposition to appellant's motion for leave to appeal, not only did not deny but confirmed that this constitutional question was raised in both lower courts and that it was raised and sought to be reviewed in the Court of Appeals. The first sentence in said brief opposing such constitutional review states (p. 3): "The claimant's contention that the statute as applied to him by the courts below is unconstitutional is based upon faulty premises and analogies."

Building upon his false thesis that the constitutional question was not presented in the State courts, counsel for appellee seeks to create the false impression (Brief, p. 3) that the refusal by the Appellate Division, to grant appellant's motion to amend its remittitur to show that this constitutional question "was presented and necessarily passed upon", though without opinion (16 A. D. 2d 858), was upon the untrue ground that the question was not presented for review in the motion in the Court of Appeals for leave to appeal. Significantly, he does not controvert appellant's contention at pages 7-8 of the jurisdictional statement that, though remaining silent on this constitutional question, the Appellate Division necessarily passed on it.

If the Appellate Division, although appellee does not so claim here, denied the motion to amend the remittitur because it had not passed upon the constitutional question, it would have been simple for it to say so in one brief sentence. The Court of Appeals of New York, in denying such a motion, invariably states its reason briefly (See: *Matter of Police Benevolent Ass'n. v. Gagliardi*, 10 N. Y. 2d 749). As stated in the jurisdictional statement (p. 8), the Appellate Division could not very well state that it had applied the

statute to appellant and had not passed upon the claim by appellant that such application to him was in violation of his constitutional rights, which contention was properly presented to it under New York procedure. To say that it had not passed upon this question would be a statement by the Court that it had deliberately refused to consider and adjudicate appellant's claim that his constitutional rights were violated. Such refusal to even consider and adjudicate such properly raised constitutional claim would be a denial of due process even more monstrous than the expropriation and confiscation of appellant's money. In such case, this Court would redress such patent denial of due process by vacating the judgment of the State court and remanding the cause with direction to consider and adjudicate appellant's claim that the State had unconstitutionally applied its statute to him (*Minnesota v. National Tea Co.*, 309 U. S. 551, 555-556, 84 L. ed. 920, 923, 60 S. Ct. 676, 679). Otherwise, the State court would have devised a method by which appellant, who had properly raised the claim in all the courts that his constitutional rights were violated, would be thrown out of court without having his constitutional claim considered in any court, anywhere.

It is clear, however, that the State court did necessarily pass upon and reject appellant's constitutional claim which was not only properly presented to it, but, which was the contention upon which appellant's brief and oral argument were founded, and that the sustaining of the validity of the statute by such rejection is properly before this Court for review on this appeal.

(2)

Although the appellee's motion is to dismiss for want of jurisdiction, appellee has interspersed its brief with its argument on the merits, thus, in effect, joining with it a motion to affirm, though not making any motion to affirm. Rather than thereby indicating that the federal question raised by appellant is not substantial, appellee, it is submitted, seems instead to establish that its own argument on the constitutional question is insubstantial.

The pari-mutual revenue statute, as construed by the courts of New York State, is designed to raise revenue for the State. Under such statute, the State takes eleven per cent of the monies in the wagering pool as its tax thereon, the racing association takes four per cent as its share, and the balance is distributed to the winners upon presentation of their tickets (Section 9, Jurisdictional Statement p. 31). The money to be so distributed is held by the racing association until April first of the succeeding year, at which time the balance remaining unclaimed is paid over to the State (Section 12, Jurisdictional Statement p. 33). The statute includes in the term "unclaimed balance" the monies due purchasers of winning tickets who have lost or inadvertently destroyed them, despite the fact that these purchasers might not, in fact, fail to claim them. The appellant here, aggressively and vociferously made claim to such winnings within minutes after the race was run and continuously thereafter. It is thus the design of the statute to forfeit and expropriate to the State as "revenue", in addition to the tax thereon already collected by the State, the entire proceeds of such lost or inadvertently destroyed tickets since the statute prohibits the racing association from paying out to admitted purchasers, who have thus inadvertently destroyed their tickets and re-

quires it to pay such monies instead to the State. Since the enactment of the statute in 1940, in the language of the State Tax Department itself: "we receive similar type letters monthly under various circumstances in which the person who originally purchased the winning tickets had lost or destroyed same" (R. 39). The State nevertheless advises such purchasers as the State Tax Commission advised appellant on May 11, 1959: "In view of the information contained in your letter of April 29, the sum of $1295.00 which represents the value of these two destroyed winning tickets will be part of the unclaimed ticket money paid over to the State on April 10, 1960 by the New York Racing Association" (R. 28).

The State contends that the expropriation of these monies is valid in all cases without exception as a revenue provision and does not offend the federal constitution regardless of the facts to which the statute is applied.

Thus, in the case cited in the footnote at page 2 of its brief on this motion, a purchaser of three winning tickets died at the track before he could present them for payment. Employees of the undertaker stole the tickets. Upon their arrest, the district attorney, as the enabling act (N.Y. Laws 1960, ch. 372) discloses, impounded the tickets and refused to turn them over to the estate of the purchaser for presentation until after the presentation period had expired and the track, as required by the pari-mutuel statute, had paid the "unclaimed" money to the State. The State contends that in such case, the proceeds nevertheless belonged to the State as "revenue" and that a special statute was necessary before the State could be required to pay these monies over to the rightful owner. It is quite clear that no such special statute was necessary. If the owner's estate had brought an action against the State for

money had and received and raised the contention that such application of the statute to it was so shocking as to be repugnant to the Due Process Clause, the State's expropriation of the money would not be sustained. In such a case, the claimant's recovery of the money would not be dependent on whether or not, as an act of grace, the State deigned by special statute to give up money belonging to the State, but on the claimant's right to money which never rightfully belonged to the State but to the claimant.

Similarly, if for example, a purchaser of a pari-mutuel ticket, just after the ticket had been punched out to him, was still waiting at the window for his change and put his hand, with the ticket in it, to his mouth to light a cigarette and the matches had suddenly flared up and ignited and burned up the ticket in the presence of the ticket seller, it would be shocking and a clear deprivation of property without due process of law for the State, by its statute, to hold that prospective winnings on the ticket, then and there became the absolute property of the State, since the ticket could never be presented for payment, and that the purchaser by such inadvertent destruction of the ticket had forfeited his admitted winnings to the State.

Yet, though not so graphically or dramatically, that is what happened here. The State admits that to its knowledge, acquired within minutes after the purchase, the appellant was the purchaser of these particular winning tickets and within minutes, even before the race was run, inadvertently destroyed them. Yet the State courts have held that when the tickets were thus inadvertently destroyed, the winnings thereon then and there became the property of the State, unless the appellant complied with the impossible condition of presenting the tickets within the time limitation.

The case of *Aliano* v. *Westchester Racing Assn.*, 265 App. Div. 225, cited by appellee at page 4 of its brief, was an action against the track and not the State which involved only the construction of the statute and not the federal constitutional question presented here. The State cannot by the construction of the statute by its courts prior to the assertion of this federal constitutional claim by appellant cotain immunity for its statute from challenge on federal constitutional grounds as appellee seems to claim at pages 4-5 of its brief. If this were so, the States could insulate all their statutes against constitutional challenge to their validity and thus nullify the Fourteenth Amendment.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction noted.

Respectfully submitted,

Irwin N. Wilpon,
Counsel for Appellant.

August 1962

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Supreme Court of the United States

No. 265 October Term, 1962

RONALD CARR,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, THIRD DEPARTMENT

MOTION TO DISMISS FOR WANT OF JURISDICTION AND SUPPORTING BRIEF

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Supreme Court of the United States

No. 265 October Term, 1962

RONALD CARR,

Appellant.

against

THE STATE OF NEW YORK,

Appellee.

BRIEF IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION

The case involves no properly presented federal question whatsoever; and the appellee accordingly moves to dismiss the appeal purporting to have been taken to this Court by Notice of Appeal dated June 19, 1962, for want of jurisdiction in this Court to entertain it.

(1)

The appellant was the holder of two winning tickets at a racetrack in New York State but having lost or accidentally destroyed his tickets, he was unable to present them within the time fixed by N. Y. Laws 1940, ch. 254, § 12, *infra*.

Pari-mutuel betting was sanctioned in New York by an amendment to the State Constitution approved by the voters in 1939. The amendment qualified the prohibition against

gambling, and is found in Art. I, § 9. And see *Matter of Stoughton* v. *Cohen*, 281 N. Y. 343 (1939). The statutes passed upon the passage of the amendment were so phrased as to ensure the accrual of substantial revenue to the State through a tax upon the pari-mutuel revenue pool. The statute declared this purpose in plain terms. N. Y. Laws 1940, ch. 254, § 2. For the purpose of facilitating the calculation of taxes payable to the State and imposed on what was left in the pool after paying off successful bettors, the statute provided (§ 12) that funds for bettors' benefit should be retained by the tracks until April first of the ensuing year. "Within ten days thereafter, the balance of such sum remaining unclaimed and any other unclaimed amount received in the course of conducting pari-mutuel betting shall be paid to the state tax commission" (§ 12, last sentence, as amended by N. Y. L. 1957, ch. 447).*

So much for the statutory impediments to the appellant's success.

(2)

When appellant filed his claim with the Court of Claims (R., 11), he made no mention therein of any constitution—either State or Federal—as a basis for the claim. When he made a motion for judgment on admissions (New York Civil Practice Act, § 476) after the Attorney General had, by not denying, conceded the truth of allegations in appellant's Notice to Admit (R., 17-21), no mention was made of any constitution in the motion papers (Moving Affidavit, R., 15-16, and Exhibits 22-40).

* When a bettor died at the track and a winning ticket in his pocket was stolen by the undertaker's employees and recovered later, a special enabling act was necessary to enable the estate to collect. N. Y. Laws 1960, ch. 372.

The record does not contain a copy of appellant's brief in the Court of Claims but his motion was denied and the claim dismissed in an opinion set forth in the Jurisdictional Statement, pp. 18-22; reported 30 Misc. 2d 983. The opinion makes no mention of any claim under the U. S. Constitution.

Constitutional rights were belatedly asserted in appellant's brief on appeal to the Appellate Division of the New York Supreme Court, Third Department, as the Jurisdictional Statement shows at p. 6. But the appellant had so little faith in the substantiality of his constitutional point that, upon meeting defeat in a unanimous decision of the Appellate Division (Jurisdictional Statement, pp. 23-24; reported 15 A. D. 2d 709), he did not take an appeal as of right to the Court of Appeals, which is sanctioned where constitutionality of a statute is involved (N. Y. Civil Practice Act, § 588, subd. 1), but *sought leave to appeal.* Leave was denied without qualification*. Jurisdictional Statement, p. 29; reported 11 N. Y. 2d 645.

It is the custom of the Court of Appeals, when leave is sought in a case where leave to appeal is not required, to state that leave is denied because unnecessary.

In spite of his commitment by conduct to the non-existence of a constitutional question, appellant went to the Appellate Division and asked that Court to amend its remittitur to the Court of Claims to add to the remittitur a recital that a constitutional question "was presented and necessarily passed upon". This the Appellate Division refused to do. 16 A. D. 2d 858.

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*The Appellate Division had previously denied leave. 15 A. D. 2d 988.

(3)

In another case involving a lost or destroyed pari-mutuel ticket on a winning horse, *Aliano* v. *Westchester Racing Assn.*, 265 App. Div. 225, 38 N. Y. Supp. 2d 741 (2nd Dept., 1942), the Court, after citing the 1939 amendment to the New York Constitution and L. 1940, ch. 254, *supra*, said (p. 229):

> "The failure of the Legislature to provide for lost or destroyed pari-mutuel tickets was undoubtedly due to a recognition that the nature of the pari-mutuel system of betting necessarily requires a ticket to evidence the bettor's participation in the pool and that payment could not practicably be made without presentation of such ticket.
>
> Prior to the enactment of the Pari-Mutuel Revenue Law betting at horse races was illegal and the only remedy a bettor at a race track had was the recovery of his bet in a civil action. The law was not enacted for the purpose of legalizing betting at race tracks but of raising revenue for the State, '* * * it being the purpose of this act to derive from such betting as herein authorized a reasonable revenue for the support of government * * *.' (§ 2). Pari-mutuel betting on horse races was made lawful only '* * * if conducted in the manner and subject to the conditions and supervision provided by this act * * *.'" (§ 2.)

This case was cited and followed in the instant case. Jurisdictional Statement, p. 21.

The moneys in the pari-mutuel pool which are left after the payment of duly presented winning tickets are public moneys. *Matter of Roosevelt Raceways, Inc.* v. *Monaghan*, 9 N. Y. 2d 293 (1961), app. dis. 368 U. S. 12 (1961). Moreover, the statute imposing limitations upon the time within which claims premised upon the ownership of winning tickets must be presented, and construed by the Courts to make presentation of such ticket indispensable to col-

lection, was on the books and had been so construed, prior to the day the appellant attended a race and thereafter lost or destroyed his ticket. Thus it is manifest that no right of his under the Fourteenth Amendment has been violated.

CONCLUSION

The appeal should be dismissed for want of jurisdiction.

August 7, 1962.

Respectfully submitted,

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